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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-970

ASSOCIATED CULTURAL CLUBS, INC., a California corporation, also known as A.C.C.I., UNIVERSAL STUDENT ORGANIZATION, a corporation, MARIA RITA BOPP, J. W. REID, THOMAS D. MERCOLA, and PAULA BLYTHE,

Petitioners,

vs.

MONARCH TRAVEL SERVICES, INC., a California corporation, BEVERLY HILLS TRAVEL BUREAU, INC., a California corporation, and ECKDAHL-SUNDIN TRAVEL BUREAU, a California corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT OF THE UNITED STATES.

MORRIS LAVINE,
215 West Seventh Street
Suite 620
Los Angeles, California 90014
Tel: MAdison (213) 7-3241
Attorney for Petitioners.

[illegible] PRINTING COMPANY, PRINTERS—CHICAGO 6-1782

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IN THE

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ASSOCIATED CULTURAL CLUBS, INC., a California corporation, also known as A.C.C.I., UNIVERSAL STUDENT ORGANIZATION, a corporation, MARIA RITA BOPP, J. W. REID, THOMAS D. MERCOLA, and PAULA BLYTHE,
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Respondents.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT OF THE UNITED STATES.

To the Honorable Chief Justice Warren Burger and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, the defendants in the above entitled case, respectfully petition this Honorable Court for a writ of certiorari directed to the United States

Court of Appeals for the Ninth Circuit to review and reverse an order granting a preliminary injunction to the respondents, holding that a cultural and social club which has arranged charter flights for a portion of its members (many of them college students and professors) from Los Angeles, California, U.S.A. to London, England, on a British airplane, wholly owned by a British company, (The Donaldson Airline) is an "indirect air carrier" within the meaning of 49 U.S.C. Sec. 1301(3), and thus acted in violation of 49 U.S.C. Sec. 1571(a), and also holding that charter plane flight restrictions by the C.A.B. for economical prices are constitutional within the American privileges and immunities of the right of Americans to travel freely, and as first class citizens. (U.S. v. Guest 383 U.S. 745, 766-767) 16 L. Ed. (2) 239.

Opinions of the District Court of the Eastern District of New York, (Second Circuit) Judge Anthony Travia, presiding on October 25, 1972, refused an injunction and refused to hold charter flights were "indirect air carriers," contrary to the holding of the United States District Court, Central District of California, (Ninth Circuit) thus requiring this Court to grant a hearing to resolve the conflict and determine which is correct. (*Gelbard v. U.S.* No. 71-110; 33 L. Ed. (2) 179, See Appendixes B and C, Oct. Term 1972.)

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, U.S. Codes.

The decision of the Court of Appeals (No. 71-2053, 9th Circuit) was rendered September 15, 1972. Rehearing was denied October 16, 1972.

This petition is filed within 90 days of the denial of the petition for rehearing.

OPINION BELOW

The opinion below is reported at 466 F. 2d 552. A copy thereof is attached hereto as Appendix "A" and made a part here. The opinions of Judge Anthony Travia, Eastern District of New York are attached hereto and made a part hereof, Exhibits B and C, Appendix.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Privileges and immunities of American citizens. (*U.S. v. Guest,* 383 U.S. 745, 766-7) 16 L. Ed.(2) 239, 254, 255

First Amendment Right of Association (*Healy v. James* 33 L. Ed. (2) 266, 267)

Fifth Amendment, United States Constitution (due process of law) The right to travel freely. *Kent v. Dulles* 357 U.S. 116; 2 L.Ed.(2) 1206, 1210 et seq.;

Edwards v. California 314 U.S. 160; *Dayton v. Dulles* 357 U.S. 144

Federal Aviation Act of 1958, Sections 101, et seq., 401(a) and 1007(a) [49 U.S.C. Section 1301, et seq., 1371(a), and 1487(a)]

14 Code of Federal Regulations 207.40(b)(2) and 208(6)(b)

THE FACTS

Petitioners are California corporations and individual officers. The corporations are known as Associated Cultural Clubs, Inc., also A.C.C.I., and Universal Student Organization, U.S.O. They had a membership of about 11,000 students, professors, and others interested in culture and arranged cultural meetings for their members as part of their cultural program arranged for charter flights from Los Angeles to London and return at a price ranging between $275 to $325 for round trip per flight as against 1st class charges of $1100 and economy flights at $550. They were unable to get an American air line to handle their members who wished to travel to London and back but were able to enter into a contract with Donaldson Air Lines, a British company, for their members to travel to London and back economically, $225 to $325 a round trip, and at a rate not then available on any other air line of the United States. Since plaintiffs obtained their preliminary injunction Economical flights have opened to everyone on regular American and foreign lines.

THE FACTS CONFIRMED

On May 14, 1971 respondents, three small travel agencies named as plaintiffs) doing business as corporations organized and existing under the laws of the State of California, brought an action in the United States District Court, Central District of California, on their own behalf and on behalf of the class consisting of all *travel* agents in Southern California, to enjoin the petitioners from arranging charter flights to London at economical rates. They were apparently backed by the large air lines, or some of them, who posted a bond of $100,000 to cover damages to petitioners and others. The cross claim asserted damages of $10,000,000.

Respondents, the three travel agents, sought the injunction on the basis that the charter flights and the lower fares than the regular price were damaging their business. They claimed standing as parties in interest to bring the suit under Section 1007(a) of Title 49, U.S.C., and Section 1487(a) of Title 49, and under Title 28, Sections 1331(a) and 1337, U.S. Codes. Petitioners contested this standing, and denied that the charter flights interfered with travel agencies serving regular flights.

The plaintiffs made no complaint to the C.A.B. nor did they ask for a hearing from the C.A.B. which the aviation statute permits but plunged into the United States District Court at Los Angeles on an original proceeding for a preliminary injunction be-

fore a U.S. District Judge, alleging that defendants were "indirect air carriers."

The business of the respondents as travel agencies was shown to have been based upon a high class luxury trip and a fixed commission of 7 per cent of the high cost of the flights which they arranged, either as first class or economy class. If they were damaged this could have been calculated.

Respondents engaged detectives who were not genuine passengers nor actually intended to be passengers, although they fraudulently represented themselves as prospective passengers, fraudulently seeking membership in the defendant club. These private detectives tried to discover alleged violations by the petitioners of the rules and regulations of the Civil Aeronautics Board regarding charter flight requirements for membership and to put the petitioner-corporations out of business as cultural clubs, and as clubs that were able to arrange charter flights and tours for their members at an economical price.

Only one of the defendants claimed to have switched from a regular flight to a charter flight.

Associated Cultural Clubs was operated by Maria Rita Bopp, president, who has been the highly successful operator of the Cultural Club for more than two years past and was on the third year arranging charter flights for bonafide members of her club commencing May 18, 1971 at a 30 day flight for $255 a round trip, or one-way $150 to London. A series of flight

dates were set up for further flights running through October 12, 1971.

The Court permitted the flights to operate until July 13, 1971 and then enjoined all other flights from taking part subsequent to that date. The flights were all charter flights on the Donaldson Air Lines, a British air line, and arranged flights to be returned on the same air line but were enjoined. Donaldson was not named as an indispensable party.

Several members and students were stranded in London because they were unable to use their return flight or to get a flight return on the economical price which Mrs. Bopp had arranged for them on her tours.

The plaintiffs' complaint alleged that they, the plaintiffs were selling tours and air transportation to the public, using legal tariffs and that the defendants were engaged in selling tours and air transportation to the public on their "fictitious" charters. Plaintiffs alleged further the defendants are therefore competing with the plaintiffs for the trade of those members of the public who want tours requiring air transportation. Also they alleged that defendants are engaged in unfair competition in that by pretending that their clientele have chartered airplanes the defendants are enabled to offer air transportation at prices substantially below legal tariffs. They alleged plaintiffs cannot fairly compete with this tactic without violating the law the same as defendants.

The complaint further charged that defendants'

use of "sham charters" is in violation of the Federal Aviation Act and Civil Aeronautics Board charter regulations 14 C.F.R. Part. 208. The plaintiffs alleged that they lost customers through the program of the defendants and that they would continue to lose customers, to their "irreparable damage." There was no proof of this.

No affidavit supported these allegations nor was there any specific showing of irreparable damage. Plaintiffs presented state forms of "declaration" of detectives to further their unverified complaint.

The plaintiffs alleged that the defendants were "indirect air carriers," as follows: "In selling air transportation to members of the public under the guise of a charter, the defendants are acting as 'indirect air carriers' under the Act and C.A.B. interpretation. Defendants have neither a certificate under Section 401(a) nor exemption under Section 1013. Consequently, defendants' charter activities are in violation of Section 401(a) of the Act, and *a crime* under Section 902(a) of the Act."

The complaint was not verified as required by Rule 65, Federal Rules of Civil Procedure, nor were the so-called "affidavits" in support of the complaint "affidavits," but were declarations used under California State law in state, but not federal proceedings.

In the response to the plaintiffs' complaint, the defendants moved to dismiss the complaint under Rule 12(b), Federal Rules of Civil Procedure on the grounds

of lack of jurisdiction over the subject matter, lack of jurisdiction over the person, failure to state a claim upon which relief can be granted, failure to join an indispensable party, to-wit, the Civil Aeronautics Board, charged with the duty of supervising all civil aeronautics matters and enforcing all regulations, if violated, and Donaldson Air Lines.

In the preliminary statement, the defendan set forth that the defendant Club is licensed to do business in California in accordance with its objects and sells its memberships for an annual fee of $15. It is not an air line but does organize charter flights of part of its 11,000 members throughout the world (but only about 4% of its members take such flights). As part of its cultural activity it caters particularly to teachers and students in an organization allied with it, known as A.C.C.I., Universal Student Organization. Generally this organization arranged charter flights for college students and even high school students during the vacation months as a continuing education and culture of these students. Such groups and such flights are encouraged by the Civil Aeronautics Board and the government.

Because of their mass operation and limited services and facilities they are able to arrange for a lower cost of the flights than those sold by the travel agencies on regular flights with unlimited services and facilities. Approximately several hundred students had already bought charter flights from the defendants to be taken

during the months of June and July. Most of the students have saved their money for the summer cultural flights arranged by Associated Cultural Clubs, Inc. and have already paid and made arrangements for the summer flights. The response alleged these attempts to enjoin these flights would interfere with and break the contracts made for these flights.

Defendants alleged that no action was first filed by the plaintiffs or any of them, or any complaint of any sort, with the administrative agency, the Civil Aeronautics Board, or the Administrator of the Board, pursuant to the provisions of Title 49, Section 1482, which provides for a hearing upon any complaint in writing, made upon notice, and an opportunity to be heard. (Due process guaranteed by the 5th and 14th Amendments U.S. Constitution) Footnote 53 In re Gault, 387 U.S. 33 *Mullana v. Central Harbour Tr. Co.* 339 U.S. 306.

The New York Court, Eastern District Judge Anthony Travia rejected the application for an injunction for the reason that application was not first presented to the C.A.B. and there heard and acted on. See Eastern Court Opinions Appendix B and C.

Defendants alleged that by reason of the foregoing, the California Court lacks jurisdiction over the subject matter and lacks jurisdiction over the person. Before jurisdiction may be acquired over the subject matter, defendants alleged that plaintiffs were required to comply with Section 1482 of Title 49 and

exhaust their administrative remedies. The California District Court did not require them to do so, but the New York Court did.

Furthermore, defendants asserted that the complaint charges defendants with *a crime* or plotting to commit acts which would be criminal, and an injunction does not lie to restrain a crime.

Defendants asserted that the three plaintiffs and the class they allege to represent are not interested parties or "any party in interest," as those words have been expressed in the statute. They are merely commercial competitors in the business of selling travel space, as best they are able. If defendants through more, better and cheaper service of a cultural nature can serve the public or its members, that does not give plaintiffs any right or *standing to sue.*

The motion to dismiss also set forth the right to travel in search of culture is a right guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. Defendants asserted "it is an attribute of a personal liberty guaranteed by the Fourteenth Amendment. It is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment."

The supplemental motion to dismiss under Rule 12b set forth that the plaintiffs have failed to file a verified complaint as required by Rule 65 Rules of Procedure. The plaintiffs' complaint was not verified. Further, the so-called "affidavits" were unsupported

hearsay and were not "affidavits" as required by the rules of the federal Court. Further, it alleged that the plaintiffs are not parties in interest within the meaning of Title 49, Section 647 and 1007, U.S. Codes. (See *Trans-Pacific Airlines, Ltd. v. Inter-Island Steam Navigation Co.*, 75 F. Supp. 690, 692-4; *Singer & Sons v. Union Pacific*, 311 U.S. 295, 85 L. Ed. 198) Also, that the complaint fails to set forth facts showing irreparable damage.

The Court denied the defendants' motion and issued a temporary injunction, a copy of which follows:

IRSFELD, IRSFELD & YOUNGER
Attorneys at Law
6381 Hollywood Boulevard
Hollywood, California 90028
Telephone No. (213) 466-4161
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MONARCH TRAVEL SERVICES, INC., a California corporation, BEVERLY HILLS TRAVEL BUREAU, INC., a California corporation, and ECKDAHL-SUNDIN TRAVEL BUREAU, a California corporation,	)	CIVIL ACTION NO. 71-1176-WPG
Plaintiffs,	)	
vs.	)	
ASSOCIATED CULTURAL CLUBS, INC., a California corporation, also known as A.C.C.I., UNIVERSAL STUDENTS ORGANIZATION, a corporation, MARIA RITA BOPP, J. W. REID, THOMAS D. MERCOLA and PAULA BLYTHE,	)	
Defendants.	)	

PRELIMINARY INJUNCTION

The Motion of Plaintiffs herein for a Preliminary Injunction having come on for hearing on June 1, 1971, and June 4, 1971 at 10:00 A.M. before the Honorable William P. Gray, Judge Presiding in Room 6 of the United States Court House and Plaintiffs appearing through their attorneys, IRSFELD, IRSFELD & YOUNGER and CHARLES HOBBS, ESQ., and ASSOCIATED CULTURAL CLUBS, INC., a California corporation, also known as A.C.C.I., UNIVERSAL STUDENTS ORGANIZATION, MARIA

RITA BOPP, THOMAS D. MERCOLA and PAULA BLYTHE, Defendants, appearing through attorneys MORRIS LAVINE, and the matter having been argued and evidence oral and documentary having been introduced by both parties and it appearing to the Court that Defendants and each of them have been and now are engaging as indirect air carriers in violation of the Federal Aviation Act of 1958, Section 401(a); that said Defendants, and each of them, are presently engaged in booking passengers for a number of proposed charter flights scheduled to depart June 15, 1971, and after, in violation of the Federal Aviation Act of 1958, and that said Defendants, and each of them, will continue to book passengers on illegal charter flights if they are not restrained by this Court, thus causing continued losses to Plaintiffs' irreparable damage,

IT IS HEREBY ORDERED that Defendants, ASSOCIATED CULTURAL CLUBS, INC., a California corporation, also known as A.C.C.I., UNIVERSAL STUDENTS ORGANIZATION, MARIA RITA BOPP, J. W. REID, THOMAS D. MERCOLA and PAULA BLYTHE and their officers, agents, servants, employees, and attorneys are enjoined from engaging in business as indirect air carriers in violation of Section 401(a) of the Federal Aviation Act of 1958, from soliciting or offering their services as indirect air carriers, from holding themselves, or any of them, out to the public as being authorized to engage in indirect air transportation, and from violating

the provisions of Section 401a() of the Federal Aviation Act of 1958 and the provisions of all pertinent regulations issued thereunder:

IT IS HEREBY FURTHER ORDERED that said Defendants, and each of them, are enjoined from doing the following:

1. Mailing to names on commercial mailing lists solicitations advertising their charter flights.
2. Soliciting or accepting the business of persons who are not members of any bona fide club or other organization, for charter flights.
3. Signing up any person for a charter flight who has not in fact been a member of a bona fide organization for at least six months.
4. Signing up any relative of a bona fide member for a charter flight who is not a spouse, dependent, child or parent of said member and living in the member's household.
5. Soliciting or selling one-way tickets to any person in connection with a charter program involving more than three flights.
6. Advertising a fixed single-seat price for any charter flight.
7. Filing untruthful certificates with the carrier in violation of C.A.B. Regulations, e.g. 14 C.F.R. Section 214.35(d).

IT IS HEREBY FURTHER ORDERED that said Defendants, and each of them, until further order of this court, are enjoined from arranging or participating in the handling of any purported charter flights

departing July 13, 1971, or after, where passengers on such flights are purported members of the Associated Cultural Clubs, Inc. or the Universal Students Organization, and said Defendants, and each of them, shall cancel forthwith all such purported charter flights giving notice of such cancellation to passengers already books on such flights, and Defendants, and each of them, shall have nothing further to do with such persons travelling by charter; nor shall Defendants make any other arrangements for charter trips through the Associated Cultural Clubs, Inc., the Universal Students Organization, or any other organization involving any air carrier, supplemental air carrier or foreign air carrier; and Defendants are further enjoined from assisting such passengers in transferring to any other charter flight or flights whatsoever.

Each defendant is further enjoined from making any expenditures from funds received on account of payment for passage on any of the prohibited flights, except as part of pro-rata reimbursement to the people from whom such payments were received.

IT IS HEREBY FURTHER ORDERED that said Defendants, and each of them, are enjoined as set forth above until entry of a final judgment herein.

IT IS HEREBY FURTHER ORDERED that as a condition precedent to the issuance and maintenance of the Preliminary Injunction Plaintiffs shall forthwith give security of $100,000 conditioned on the payment of such costs and damages as may be incurred or

suffered by any defendant who may be found to have been wrongfully enjoined or restrained.

DATED: June 4, 1971.

WILLIAM P. GRAY (Judge)

The last order enjoining expenditures was not asked for by the plaintiffs but was done by the Court on its own motion.

An appeal was duly taken to the Court of Appeals for the Ninth Circuit. Although respondents asked that Court to decide the case quickly in order to prevent further charter flights during the summer of 1972, that Court did not render its decision until September 15, 1972 and considered a rehearing which it denied October 16, 1972, affirming the District Court's judgment. That Court ignored all the questions raised by the defendants on motion to dismiss, namely, that the Court below had proceeded on an unverified complaint, required by Rule 65, Federal Rules of Civil Procedure, and ignored the fact that all of the documents filed by the plaintiffs were mere declarations and not affidavits and that it failed to set forth irreparable damage. The Court, after rendering its decision to enjoin defendants took an oath from the people who had filed the declarations but these were not evidentiary as the Court below had passed on the matter.

The Court of Appeals presented three contentions raised by the appellants which they said required discussion as follows.

"1. Is Monarch 'any party in interest' within the meaning of 49 U.S.C. Sec. 1487(a) and thus endowed with standing to maintain the suit?

"2. Is A.C.C.I. operating as an 'indirect air carrier' within the meaning of 49 U.S.C. 1301(3) and thus acting in violation of 49 U.S.C. Sec. 1371a?

"3. Are Section 1301(3) and 1371(a) and the pertinent C.A.B. regulations defining 'charter' unconstitutional restrictions on the right to travel?"

The Court of Appeals rendered its decision holding that the plaintiffs had standing to bring suit in the District Court prior to applying for a hearing before the Civil Aeronautics Board and prior to receiving any complaint before that Board and that they were a party in interest although none of the declarations (not affidavits except one) specified any genuine intention to take a charter flight through the defendant company. All the rest were "declarations" of members of the Burns Detective Agency, who pretended an interest and were inquiring about alleged violations of regulations to be charter members of the organization for six months prior to the flight, a regulation we challenge as unconstitutional.

Furthermore, there was no proof presented by any affidavits, and not even by declarations of a showing of irreparable injury or that the plaintiffs would ultimately succeed in the lawsuit.

The principal request made by the plaintiffs to the Court of Appeals was to find that the defendants were

"an indirect air carrier" within the meaning of 49 U.S.C. Sec. 1301(3) and thus acting in violation of 49 U.S.C. Sec. 1371(a).

The Court of Appeals for the Ninth Circuit found that the defendants were such "an indirect carrier" although they own no airplane or have any interest in one and none of the members become passengers until they are duly accepted by the air line as a passenger under standard law regarding carriers which we will set forth more fully hereafter.

Appellants responded in a petition for rehearing that A.C.C.I. has a total members of 11,000. Of this number, Mrs. Bopp swore that she arranged for about 40 seats per flight. On the basis of 12 round trip flights per year of 40 passengers each, she swore that this would involve only 480 members, just slightly over 4 per cent of the total membership of 11,000 members. With 11,000 club members, about 10,500 of whom do not fly but who can take part in other cultural activities of this duly incorporated cultural club, she answered that it cannot by any stretch of the imagination be said that A.C.C.I. is an "indirect air carrier." Its travel arrangements are merely part of its over-all cultural offering as a club. She pointed out that there are more charter flights arranged by bar associations, such as the Universty of California, the University of Southern California, the Lawyers Club, the Los Angeles County Bar Association, the Elks Club, Masonic organizations and other bodies than are arranged by this defendant.

The defendant pointed out that she is a woman who has successfully operated this club and the only one that has been attacked to knock out the charter flights and that her treatment, being singled out for invidious treatment in violation of the equal protection of the laws guaranteed by due process of law and the Fifth and Fourteenth Amendments is discriminatory and invidious. (*Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220; *Dandridge v. Williams*, 397 U.S. 471, 25 L. Ed. 2d 491, 505; *Shapiro v. Thompson*, 394 U.S. 618, 658, 663, 22 L. Ed. 2d 600) The courts below ignored this contention.

DEFENDANTS RESPONDED BELOW AND CERTIFIED THAT PLAINTIFFS HAVE NO STANDING TO SUE.

They assert that the plaintiffs have no private claim so special as to give them the power to litigate a public controversy. Their remedy, they assert under the Federal Aviation Act is to petition the C.A.B. Board to act in the public interest to enforce the Act's provision. (*Trans Pacific Air Lines v. Inter-Island Steam Nav. Co.*, 75 F. Supp. 690 (holding with approval *Massachusetts v. Mellon*, 262 U.S. 447, 488, 67 L.Ed. 10783) see F. Supp. at 694; also see *L. Singer & Sons v. Union Pacific Railroad Co.*, 311 U.S. 294, 85 L. Ed. 198) This was the holding of the New York Court Eastern District.

Petitioners assert that plaintiffs' claims were not so special as to give it power to litigate a public controversy. (See 75 F. Supp. 694)

Plaintiffs witnesses were not passengers nor was there any economic loss actually shown by any evidence. Private detectives falsely represented themselves that they were going to be club members and later to be passengers but never were.

The following in the opinion are misstatements of fact in the Circuit Courts opinion:

"It hires planes from direct aircraft carriers."

Associated Cultural Clubs does not hire and did not hire any planes. It only contracted with a carrier to agree to accept its membership for a flight if qualified and acceptable to be passengers at the time that they were to board the airplane. The airplane accepts or rejects them at the time of flight. Defendants have no ownership or proprietary interest in the plane.

The court of appeals statement that defendant

"Solicits members of the general public to purchase tickets on the flight it arranges" is not supported by the evidence or the facts as A.C.C.I. solicited its own 11,000 membership consisting of a large number of students and teachers and other persons interested in culture to take such cultural trips as it was able to arrange. This is perfectly legal activity.

The Court erroneously stated as follows:

"A.C.C.I. was in the transportation business thinly disguised as a club."

In Mrs. Bopp's affidavit attached to the motion to

dismiss the complaint for injunction, uncontradicted anywhere, she states as follows:

> "We, the Cultural Clubs, have not taken away plaintiffs' business. We have our own members—about 11,000 of them—who were and are free to join any club or travel group they wish. We have not gone out of our way to take clients away from anyone, as we do not need to do so. We have arranged 12 round trip flights for this year."

We could give the Court many circulars advertising charter flights which we are receiving almost daily. These emphasize the point that A.C.C.I. was singled out for invidious treatment in violation of the equal protection of the laws guaranteed by the due process clause of the Fifth Amendment and the Fourteenth Amendment.

The District Court has, through this lawsuit, singled out the defendants for discriminatory and invidious treatment. (*Yick Wo v. Hopkins,* 118 U.S. 356, 30 L. Ed. 220; *Dandridge v. Williams,* 397 U.S. 471, 25 L. Ed. 2d 491, 505; *Shapiro v. Thompson,* 394 U.S. 618, 658, 663, 22 L. Ed. 2d 600; *Morey v. Doud,* 354 U.S. 457 465, 1 L. Ed. 2d 1485, 1491; see *Gulf, Colorado & Santa Fe R. Co. v. Ellis,* 165 U.S. 150, 155, 11 L. Ed. 2d 666, 668)

The Court states in its footnote 2 that authorized charters are defined by C.F.R. Sec. 208(6)(b) as "Air transportation . . . where the entire capacity of one or more aircraft has been engaged for the movement

of persons and/or properrty . . ." A.C.C.I. never engaged the entire capacity of an aircraft and hence were not charterers within the definition but were merely like the plaintiff Monarch, an agent in booking passage for its members and in arranging tours for its members. Their different mode of business did not make them either *indirect carriers or authorized charterers.* They were in no different position than Monarch, whatever its label, except that Monarch was booking the public at large and were therefore more in the class referred to by the Court than Associated Cultural Clubs, which was booking its members. The purported regulation limiting and requiring persons to be members for six months prior to the flight was and is an unconstitutional restriction on the right to travel which we have discussed in our opening brief. A.C.C.I. was in the transportation field for its members and was not in any disguise.

The Court has not passed upon the points raised in our opening brief as to the requirement of Rule 65, Rules of Civil Procedure, requiring that a complaint for injunction be verified under oath.

It also failed to pass upon the objections to the declarations as affidavits or that the declarations were of private detectives and not bonafide passengers or persons who had any interest.

Furthermore, there is no allegation of proof of irreparable injury nor that the damages, if any, could not be factually calculated by the 7 per cent commis-

sion which is what travel agencies collect from the travel companies.

The Court also failed to pass upon the failure to join Donaldson International Airways and the Civil Aeronautics Board as indispensable parties.

We reiterate that this cultural club has been singled out for invidious treatment, it being run by a woman, and is the only one that appears to have been attacked by the plaintiffs.

CONTRARY DECISION BY THE DISTRICT COURT IN THE SECOND CIRCUIT

We are informed through a magazine article that a similar application was made before the Honorable Anthony Travia, United States District Judge, Eastern District of New York (2d Cir.) for a preliminary injunction based upon the decision of the Court of Appeals for the Ninth Circuit and against various charter flight agencies in New York including the Donaldson Air Lines, which was the main air line used by the appellants in California from California to London and rejected by Judge Travia.

New York Judge Travia denied the injunction and disagreed with the holding of the California District Court and Court of Appeals that such a club is "an indirect air carrier" and refused an injunction and held the matter should go administratively through the C.A.B.

The result of the preliminary injunction in Los Angeles was to cause the stranding of several hundred students and teachers in London, who could not obtain the flights back which they would normally have been entitled to receive. Nor was there any evidence presented to the District Court or the Court of Appeals that the plaintiffs in this action could have been successful or that they would be irreparably damaged. Only one affidavit supported the story that the party would have changed flights and have obtained a regular flight.

The Ninth Circuit declines to stay the mandate for a preliminary injuncton to the court below.

QUESTIONS PRESENTED

1. Whether plaintiffs have standing to have brought this action in the U.S. District Court without first having exhausted the administrative remedies of the C.A.B. and to have first lodged their complaint and had a hearing on notice and an opportunity to be heard, required by due process of law guaranteed by the Fifth Amendment U.S. Constitution whether primary jurisdiction is in C.A.B.

2. Whether the defendants are "indirect air carriers" within the meaning of the Federal Aviation Act of 1958, 72 Stats. 731, 49 USC Sec. 1301(3)-1542 and are thus acting in violation of 49 U.S.C. Sec. 1371a.

3. Whether the unverified complaint and the declarations (not affidavits) of fictitious claims or asser-

tions by detective agencies or persons who were not intended flyers, failed to allege facts which would rise to any claim including irreparable damage and the probability of ultimate success against defendants.

4. Whether the unverified complaint and the documents (not affidavits) in support of it are hearsay and establish that here would be irreparable injury to the plaintiffs.

5. Whether it was shown by any competent evidence that money damages would be inadequate to compensate the plaintiffs if they succeeded and were entitled to any.

6. Whether the C.A.B. was an indispensible party.

7. Whether the unverified pleadings and the documents called declarations in support of the motion for an injunction were inadequate under Civil Rule 65 Rules of Procedure for the U.S. District Court.

8. Whether it was prejudicial error for the trial Court to enjoin the defendants and to also enjoin the use of money deposited by defendants in bank accounts except to reimburse purchasers of travel.

9. Whether there was any jurisdiction on the part of the U.S. District Court in view of the insufficiency of a verified complaint and insufficiency of the affidavits.

10. Whether the Donaldson International Airways was an indispensable party.

11. Whether the right to travel economically and freely without restriction as to time or membership is a right guaranteed by the privileges and immunities section of the Constitution of the United States, which neither Congress nor any agency of the government may interfere with or restrict with clean hands.

12. Whether the plaintiffs acted in bad faith and with unclean hands in trying to destroy the membership and organization and operation of Associated Cultural Clubs, and the right of its members to travel freely and economically.

13. Whether the plaintiffs were guilty of laches in waiting until vacation time to bring their suit and to prevent the flights which resulted in breaches of contract with the defendants.

14. Whether 1301(3) and 1371(a) and the pertinent C.A.B. regulations defining charter and requiring a membership of *six months* in a club or organization are an unconstitutional restriction on the right to travel freely and economically in violation of the privileges and immunities of the citizens of the United States and in violation of the Fifth and Fourteenth Amendments to he Constitution of the United States.

15. Whether the restriction on membership to a club or organization and requiring membership of six months to organize and permit a charter flight to travel economically is an unconstitutional restriction on the right to travel and a classification of people who only have funds in that class to be placed in a

different classification than those who don't have funds.

REASONS FOR GRANTING THE WRIT

The conflict of decision in the Ninth Circuit and the Second Circuit entitle appellants to the granting of a writ and the determination of the law and procedure in this matter—important in flights of students and professors and members of clubs who form culture charter flights.

We contend that none of the charter clubs should require six months membership. Since the time of this case, the regular air lines and other clubs have widely advertised that there is no time limit on which a person needs to be a member of any organization to take an economical flight at a price below the former or present regular fare flights.

The right to associate together for culture or for charter flights is a right guaranteed by the First Amendment to the Constitution of the United States. (*Healy v. James,* 33 L. Ed. 2d 266; *U.S. v. Guest,* 383 U.S. 745, 766, 767, 16 L. Ed. 2d 239, 254, 255)

The right to travel freely is also guaranteed by the due process of the clause of the Fifth Amendment. (*Kent v. Dulles,* 357 U.S. 116, 2 L. Ed. 1206, 1210, et seq.; *Edwards v. California,* 314 U.S. 160; *Dayton v. Dulles,* 357 U.S. 144)

The Court of Appeals erred in its facts and law,

Petitioners are not "air carriers" or "indirect air carriers." They are not "group tour operators," they have no interest in the airplane. Their obligation ceases when the member arrives at the airport to become a passenger only if accepted by the air line (Donaldson International Airways), when they would take over and be responsible for the flight. None of the declarants of plaintiff had even gone to the airport. Most of them were Burns International Detectives trying to determine if they could create a membership in less than six months and to find any other possible violations of C.A.B. regulations. Not a single declarant became an actual passenger for the flights or were accepted by the airline.

To engage in air transportation, one must have the means of transportation, to-wit, an aircraft. Petitioners had none. To be "engaged" in air transportation, one must have passengers as that word is defined in cases of law. It is a well established law of carriers generally that one is not a passenger of an aircraft until one presents himself or herself at the airport at the time and place of the flight and is accepted by the aircraft carrier for the flight. Unless these conditions concur and unite, one is not engaged in aircraft transportation, directly or indirectly. None of this occurred with any of the declarants of plaintiff. Neither the C.A.B. nor the courts can make the defendants "indirect air carriers." It is legislation which Congress has not enacted. Respondents admit that the Civil Aeronautics Act of 1938 is silent on the definition

of "indirect air carrier." The silence of Congress on the subject is significantly contrary to respondent's contention and lower court holdings.

Does the selling of space by a club or association of seats make the sellers an "indirect air carrier?" Every ticket agency and travel agency besides the charter flight people would be indirect air carriers. Congress and the Courts have ruled to the contrary.

Petitioners do not and did not hold themselves out to act for the public generally but only for their members, and only about 4 per cent of its membership take flights and could take the flights. It does not lease the space on the air line for the passengers, but only reserves space, similar to what anyone does when they call an air line or travel agency or a theater or sports arena to be sure that here is space for the person calling. Once a member of the organization of defendants, the prospective passenger has to be at the airport at the time and place designated for the flight and has to be accepted by the air line as a passenger. Then the duties of the petitioners cease. From then on the air line takes over and provides food, a place to sit and the designated location.

The operations of the petitioners is quite different than the regular air lines. The people who take these flights have to go on the plane at a specific time and have to return on a specific plane at a specific time and on a specific flight. They are not free, like those who take regular flights, to go to any hotel but are

taken to a hostel, which generally is some big house that has been set up for taking care of guests for the night. The food is economically arranged and the participants are limited to the scope of the particular price they have paid.

Only when these members are accepted by the air line do they become passengers. If they are rejected, then they do not become passengers and are entitled to a refund of their reservation. According to the affidavit of Miss Bopp, the president of the defendant Club, the function of the club was to buy a reservation on the Donaldson air line for the trip leaving at a certain time and returning at a certain time and date.

This is no different from any New York manufacturers buying tickets to the theaters in New York for buyers who come to their city. It would be as much to say that Miss Bopp is a principal and entrepreneur because she buys space for her club membership to ake a trip on the Donaldson air line as it would be to say that the New York manufacturers of clothes are theater owners or directors or actors because they buy a block of tickets to give to merchants for theaters in New York or that persons who buy tickets to a football game for their college group are indirect football players. To require the appellants to have a certificate of public convenience and necessity would be beyond the scope of the Congressional Act and would be to limit memberships and charters to invoke federal jurisdiction. We respectfully contend that this was not the intent of Congress nor the law.

This case raises important questions of constitutional and statutory law in addition to the conflict of views between the circuits and should be decided by this Honorable Court.

To prevail on motion for a temporary restraining order, plaintiffs must have shown, which they did not do, that there is immediate and irreparable injury, that success on the merits is probable and that harm to movement outweighs harm to the opposing party and to the public. (*National Prisoner Reform Association v. Sharkey*, 347 F. Supp. 1234)

Deprivation of First Amendment rights of members of petitioners cultural club of an organization was in and of itself irreparable injury, of petitioners rather than plaintiffs. We were interfered with and wrecked rather than interfering with plaintiff travel agency.

PLAINTIFFS DO NOT HAVE STANDING TO SUE

The plaintiffs have not set forth a private claim so special as to give it the power to litigate a public controversy. Its remedy was and is to petition the C.A.B. to act in the public interest to enforce the Act's provisions if they apply.

In *Trans-Pacific Airlines v. Inter-Island Steam Nav. Co.*, 75 Fed. Supp. 690, the Court quoted with approval *Massachusetts v. Mellon*, 262 U.S. 447, 488, 67 L. Ed. 1078, to the effect that to be a "party in

interest" a complainant must have more than a common concern for obedience to law in order to invoke the Court's jurisdiction. The Court said:

> "Giving the phrase 'party in interest' the same scope given it by the courts under the Transportation Act, the complaint here must be measured to determine whether or not (1) 'some definite legal right possessed by complainant is seriously threatened' or (2) 'the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.' *Western Pacific California R. Co. v. Southern Pacific Co.*, 1931, 284 U.S. 47, 51-52, 52 S. Ct. 56, 57, 76 L. Ed. 160, and *Singer & Sons v. Union Pac. Co. supra.*" (75 Fed. Supp. at 694)

The Court further said:

> "The plaintiff has not described 'a private claim * * * so special,' in my opinion, as to give it the 'power to litigate a public controversy.' Its remedy is to petition the Board to act in the public interest to enforce the Act's provisions." (75 Fed. Supp. at 695)

In *L. Singer & Sons v. Union Pacific Railroad Co.*, 311 U.S. 294, 85 L. Ed. 198, the Supreme Court held that:

> "The interest which a commission merchant doing business on or near a city market has in preventing the establishment of a competing market in an adjoining city is insufficient to make

him a 'party in interest' entitled under Sec. 1(2) of the Transportation Act to maintain a suit to enjoin a railroad from constructing or operating, to the competing market, an extension not authorized by the Interstate Commerce Commission."

The Court also said:

"The Transportation Act, 1920, was designed to protect the public against action which might endanger its interest. In order to aid that general purpose, Par. 20, Sec. 402, provides that suit for an injunction may be instituted by the United States, the Commission (I.C.C.), any Commission or Regulative Body of the state or states affected, or any 'party in interest.' Such a suit cannot be instituted by an *individual* unless he 'possesses something more than a common concern for obedience to law.' The general or common interest finds protection in the permission to sue granted to public authorities. An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action. See *Detroit & M. R. Co. v. Boyne City, G. & A. R. Co.* (DC) 286 F. 540. If such circumstances are shown he may sue; he is then 'party in interest' within the meaning of the statute. *In the absence of these circumstances he is not such a party.*" (85 L. Ed. 203)

THE COMPLAINT, AND THE ALLEGED EVIDENCE IN SUPPORT OF IT, FAILS TO ALLEGE FACTS FROM WHICH IRREPARABLE INJURY IS SHOWN OR THAT IF IT IS SHOWN THAT MONEY DAMAGES WHICH ARE FIXED WOULD BE INADEQUATE AND WOULD NOT COMPENSATE THE PLAINTIFFS.

The complaint fails to allege an amount of irreparable damage claimed by the plaintiffs which must be a basis for a preliminary injunction. Actually, the damage has all been to the defendants and their management, which have been put out of business by being unable to use the funds to pay for flights or to pay for office rent, telephones, attorneys or anything else except possible refunds.

Nothing in the pleadings for an injunction gave the Court the right to enjoin petitioner's funds on its own motion, what was not asked or prayed for.

THE PLEADINGS AND THE DOCUMENTS IN SUPPORT OF THE MOTION FOR AN INJUNCTION WERE INADEQUATE.

Rule 65(b), Federal Rules of Civil Procedure, provides as follows:

> "A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts *shown by affidavit* or by the *verified complaint* that immediate and

irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. . . ." (Emphasis added)

The complaint was unverified. The documents called affidavits were not affidavits. Therefore, jurisdiction was lacking to issue the temporary restraining order.

The documents in this case were not affidavits and the mere swearing of them after the Court had already reached its conclusion did not support the issuance of the temporary injunction. The Court held that the mere fact that the persons who submitted the documents under penalty of perjury could be prosecuted in a state court is just a technical error. (R.T. 59) We submit it is violative of Rule 65(b) of the Federal Rules of Civil Procedure and that the judgment and order of the District Court is therefore a nullity.

An affidavit is a "written declaration under oath" and in order that an affidavit be valid for any purpose, it must be sworn to. (*In re Johnston*, 220 F. 2d 218)

A purported affidavit which contained acknowledgment reciting only that alleged affiant had appeared before a notary public and acknowledged that she had

executed the document was not a sufficient affidavit to form basis for contempt proceeding in that it was not a written declaration under oath or an unsworn statement of alleged facts certified or declared to be true under penalty of perjury so that contempt proceeding was void *ab initio. (Palm Springs Alpine Estates, Inc. v. Superior Court for Los Angeles County,* 255 Cal. App. 2d 883, 63 Cal. Rptr. 618)

It is stated in 3 Am. Jur. 2d. Affidavits, Sec. 3:

> "The primary qualification of an affiant is that he have knowledge of the facts, the truth of which he affirms, except that in certain instances it is permissible for one to make allegations on information and belief, and in the absence of statutory regulation, it may be said, generally, that anyone who has knowledge of the facts and is competent to testify may make an affidavit."

DEFENDANTS ARE NOT "INDIRECT AIR CARRIERS" WITHIN THE MEANING OF THE FEDERAL AVIATION ACT OF 1958, 72 STATS. 731, 49 USC SECS. 1301-1542.

There is a little quotation which fits the efforts of the plaintiffs to stretch the law beyond congressional expression, to-wit, "A little dab of paint makes a lady look like what she aint."

The plaintiffs have attempted to use a paint brush with far broader sweeps than anything Congress expressed. An air carrier is defined in the Act, Sec.

101(3) as: " 'Air carrier' means citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation provided, that the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest."

Congress has not defined "indirect air carrier," although Congress has never lacked ability to define words and statutes without which the statutes become vague and uncertain and, if they provide for criminal sanctions, become unconstitutional. (*Connally v. General Construction Co.*, 296 U.S. 385, 70 L. Ed. 322; *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840; *Edwards v. So. Carolina*, 372 U.S. 229, 9 L. Ed. 2d 697)

Surely a club which organizes charter flights or arranges charter flights for its members or group is not an indirect air carrier and cannot be made such unless Congress directly so classifies it.

IT WAS ERROR FOR THE TRIAL COURT TO ENJOIN THE USE OF MONEY DEPOSITED BY THE DEFENDANTS IN BANK ACCOUNTS EXCEPT TO REIMBURSE PURCHASERS OF TRAVEL.

There was no pleading or prayer by the plaintiffs seeking to enjoin the bank account or funds collected by the defendant Associated Cultural Clubs, Inc. The

Court was without jurisdiction to re-write or add to the petition by the three private travel agencies. An order of the Court directing that property be transferred to a person not a party to the action and over whom the Court has no jurisdiction is improper. (*Washington v. U.S.*, (CA 9) 87 F. 2d 421 *Giardano v. Radio Corp of America*, 183 F. 2d 558)

We respectfully submit that the plaintiffs in this action are not such a party.

There was no showing that the plaintiffs would ultimately succeed on the merits and the burden of proof was on him to show such possibility of such irreparable injury. (*K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087; *Automated Marketing Systems, Inc. v. Martin*, 467 F. 2d 1181)

We pray for a writ of certiorari and for reversal of the order granting the preliminary injunction below and for an order dismissing plaintiffs complaint.

Respectfully submitted,

MORRIS LAVINE, Esq.
Attorney for Petitioners
215 West Seventh St., Suite 620
Los Angeles, Calif. 90014
Tel. (213) MAdison 7-3241

EXHIBIT A

OPINION OF COURT OF APPEAL

MONARCH TRAVEL SERVICES, INC., et al., Plaintiffs-Appellees,

v.

ASSOCIATED CULTURAL CLUBS, INC., et al., Defendants-Appellants.

No. 71-2053.

United States Court of Appeals,
Ninth Circuit.
Sept. 15, 1972.
Rehearing Denied Oct. 16, 1972

Suit brought by travel agents to enjoin "social club" whose real business was selling tours and air transportation on chartered flights, from arranging flights in claimed violation of the Federal Aviation Act. The United States District Court for the Central District of California, William P. Gray, J., granted a preliminary injunction, and an appeal was taken. The Court of Appeals, Hufstedler, Circuit Judge, held, inter alia, that the "social club" was an "indirect air carrier" within meaning of the Federal Aviation Act.

Affirmed.

1. Aviation Key 82

Within meaning of Federal Aviation Act section authorizing "any party in interest" to bring suit

against a person who violates Act provision requiring air carriers engaging in air transportation to have in force a certificate issued by the C.A.B., travel agents who suffered economic loss from the acts of "social club," whose real business was selling tours and air transportation on chartered aircraft but which had no certificate of public convenience and necessity from the Board, had standing to bring suit for violation of the Act. Federal Aviation Act of 1958, §§401(a), 1007(a), 49 U.S.C.A. §§ 1371(a), 1487(a).

2. Aviation Key 72

When an organization arranging charter flights operates very much like a carrier, it should be treated as a carrier, regardless of the labels it applies to its business or the existence of incidental features of its program not shared by ordinary carriers. Federal Aviation Act of 1958, § 101 et seq., 49 U.S.C.A. § 1301 et seq.

3. Aviation Key 72

"Social club" whose real business was selling tours and air transportation on chartered aircraft, was an "indirect air carrier" within meaning of the Federal Aviation Act, and thus was required to have in force a certificate issued by the C.A.B. Federal Aviation Act of 1958, § 101(3), 49 U.S.C.A. § 1301(3).

See publication Words and Phrases for other judicial constructions and definitions.

See publication Words and Phrases for other judicial constructions and definitions.

4. Aviation Key 73
Constitutional Law Key 83(1)

Statutes and regulations, which required "social club," whose real business was selling tours and air transportation on chartered flights and the cost of whose tickets was less than the legal tariff for non-chartered flights, to have in force a certificate issued by the Civil Aeronautics Board authorizing the "club" to engage in air transportation, did not unconstitutionally restrict the right to travel on theory that not everyone can afford to pay the higher fares on regular flights. Federal Aviation Act of 1958, §§ 101 et seq., 401(a), 49 U.S. C.A. §§ 1301 et seq., 1371(a).

Morris Lavine (argued), Los Angeles, Cal., for defendants-appellants.

Charles A. Hobbs (argued, of Wilkinson, Cragun & Barker, Washington, D.C., Irsfeld, Irsfeld & Younger, Hollywood, Cal., for plaintiffs-appellees.

William D. Keller, U.S. Atty., Frederick M. Brosio, Jr., Eugene Kramer, Assist. U.S. Attys, Los Angeles, Cal, Peter E. Edison, Stephen A. Alterman, Attys., C.A.B., Washington, D.C., amicus curiae.

Before BARNES, MERRILL and HUFSTEDLER, Circuit Judges.

HUFSTEDLER, Circuit Judge:

Three travel agents sued on behalf of themselves and other Southern California travel agents to enjoin

appellants from arranging charter flights in claimed violation of the Federal Aviation Act. (49 U.S.C. § 1301 et seq.) The district court granted a preliminary injunction, and this appeal followed.[1]

The corporate and individual appellants are closely associated with one another in the conduct of their business; we will refer to them collectively as "ACCI." The appellees will be called "Monarch."

Although ACCI is nominally a social club, its real business is selling to the general public tours and air transportation between Southern California and Europe, on aircraft it charters.[2] It hires planes from direct air carriers, solicits members of the general public to purchase tickets on the flights it arranges, and consolidates groups of passengers to fill the space it purchases. ACCI does not strictly enforce the rule that passengers on its flights be members of ACCI for six months prior the flight.[3] ACCI makes a substantial profit derived from the excess of the price of the tickets it sells over its cost in hiring the aircraft. The price of the tickets on ACCI flights is less than the legal tariff for nonchartered flights. ACCI is not

[1]The United States filed a brief *amicus curiae* in support of the district court's holding that appellants are indirect air carriers under 49 U.S.C. § 1301(3) and that appellant violated 49 U.S.C. § 1371(a) by operating as indirect air carriers without Civil Aeronautics Board authorization.

[2]Authorized charters are defined by 14 C.F.R. § 208(6)(b) as follows: "Air transportation . . . where the entire capacity of one or more aircraft has been engaged for the movement of persons and/or property. . . . (2)B. By a person (no part of whose business is the formation of groups . . . or the solicitation or sale of transportation services) for the transportation of a group of persons . . . as agent or representative of such group. . . ."

[3]14 C.F.R. 207.40(b) (2) requires that passengers on a club charter be members of the club "for a minimum of six months prior to the starting flight date."

an agent for airlines nor for its customers; it is an entrepreneur. It has no certificate of public convenience and necessity from the Civil Aeronautics Board or any exemption from the provisions of the Federal Aviation Act authorizing it to engage in air transportation.

Monarch acts as an agent, not a principal, in booking passage on air carriers and in arranging tours for its clients. Monarch's money is earned from commissions. Monarch lost commissions from clients whose custom was diverted by ACCI's competition.

Three contentions on appeal require discussion: (1) Is Monarch "any party in interest" within the meaning of 49 U.S.C. § 1487(a) and thus endowed with standing to maintain the suit. (2) Is ACCI operating as an "indirect air carrier" within the meaning of 49 U.S.C. § 1301(3) and thus acting in violation of 49 U.S.C. § 1371(a)? (3) Are §§1301(3) and 1371(a) and the pertinent C.A.B. regulations defining "charter" unconstitutional restrictions on the right to travel?

[1] Section 1487(a)[4] authorizes the Civil Aero-

[4]Section 1487(a) provides:

"If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this chapter, the Board or Administrator, as the case may be, their duly authorized agents, or, in the case of a violation of section 1371(a) of this title, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and

nautics Board ("C.A.B."), the Administrator of the Federal Aviation Agency, their agents, or "any party in interest" to bring suit against a person who violates section 1371(a) of the Act. The district court found that Monarch had suffered economic loss from ACCI's acts in violation of section 1371(a) because some clients who otherwise would have patronized Monarch were diverted to ACCI. The finding is not clearly erroneous. Is one who suffers such loss a "party in interest"? We answer affirmatively. (Northeast Airlines, Inc. v. Nationwide Charters and Conventions, Inc. (1st Cir. 1969) 413 F. 2d 335; *cf* Sierra Club v. Morton (1972) 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636; Arnold Tours, Inc. v. Camp (1970) 400 U.S. 45, 46, 91 S. Ct. 158, 27 L. Ed. 2d 179; Association of Data Processing Service Organizations, Inc. v. Camp (1970) 397 U.S. 150, 152, 90 S. Ct. 827, 25 L. Ed. 2d 184.) Accordingly, Monarch has standing to bring the suit.

ACCI did not have a C.A.B. certificate to engage in air transportation or an exemption. It acted in violation of section 1371(a)[5] if it is an indirect air carrier. Section 1301(a) defines "air carrier" as used in § 1371(a) as "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transpor-

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representatives, from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, condition, or limitation, and requiring their obedience thereto."

[5] 49 U.S.C. § 1371(a) provides:

"No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

tation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest."

[2] When an organization arranging charter flights operates very much like a carrier, it should be treated as a carrier, regardless of the labels it applies to its business or the existence of incidental features of its program not shared by ordinary carriers. (Educational Student Exchange Program, Inc. (1971) —C.A.B. — (Order 71-5-39); United European American Club (1971) — C.A.B. — (Order 71-2-33); *cf.* Las Vegas Hacienda, Inc. v. C.A.B. (9th Cir. 1962) 298 F. 2d 430; American Airlines v. C.A.B. (7th Cir. 1949) 178 F. 2d 903; Hacienda Hotels-U.S. Aircoach, Enforcement Proceeding (1958) 26 C.A.B. 372.)

[3] ACCI was in the transportation business thinly disguished as a club. The district court correctly decided that it was an indirect carrier.

[4] ACCI argues that the statutes and regulations it violated are unconstitutional restrictions on the right to travel because not everyone can afford to pay the higher fares on regular flights to Europe. No unconstitutional restraints on anyone's right to travel is imposed by the challenged statutes and regulations. The persons regulated are carriers. Of course, higher air tariffs will limit travel of those who cannot pay the price. A rich man can choose to drive a limousine; a

poor man may have to walk. The poor man's lack of choice in his mode of travel may be unforunate, but it is not unconstitutional.

ACCI's remaining contentions do not have sufficient merit to warrant discussion.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 71-C-1232

CIVIL AERONAUTICS BOARD,
Plaintiff,
— against —
AEROMATIC TRAVEL CORP.,

TOUR EUROPE TRAVEL AGENCY, INC., also d/b/a TOUR EUROPE TRAVEL SERVICES, INC., TOUR EUROPE TRAVEL CONSULTANTS, WORLDWIDE AIRLINES SERVICE and CALEDONIAN FRIENDSHIP SOCIETY,

CHRISTIAN DUBREUIL, Individually and as Officer, Agent, Servant or Employee of, and d/b/a AEROMATIC TRAVEL CORP., TOUR EUROPE TRAVEL AGENCY, INC., TOUR EUROPE TRAVEL SERVICES, INC., TOUR EUROPE TRAVEL CONSULTANTS, WORLDWIDE AIRLINES SERVICE and CALEDONIAN FRIENDSHIP SOCIETY,

FINBAR SULLIVAN, a/k/a FINBAR O'SULLIVAN, Individually and as Officer, Agent, Servant or Employee of, and d/b/a AEROMATIC TRAVEL CORP.,

PHILLIP NEWMORE, Individually and as Officer, Agent, Servant or Employee of, and d/b/a TOUR EUROPE TRAVEL AGENCY, INC., TOUR EUROPE TRAVEL SERVICES, INC., TOUR EUROPE TRAVEL CONSULTANTS, WORLDWIDE AIRLINES SERVICE and CALEDONIAN FRIENDSHIP SOCIETY,

RORY ALKIN, Individually and as Officer, Agent, Servant or Employee of, and d/b/a TOUR EUROPE TRAVEL AGENCY, INC., TOUR EUROPE TRAVEL SERVICES, INC., TOUR EUROPE TRAVEL CONSULTANTS, WORLDWIDE AIRLINES SERVICE and CALEDONIAN FRIENDSHIP SOCIETY,

JOHN S. BOYLAN, a/k/a JOHN STANLEY, Individually and as Officer, Agent, Servant or Employee of, and d/b/a TOUR EUROPE TRAVEL AGENCY, INC., TOUR EUROPE TRAVEL SERVICES, INC., TOUR EUROPE TRAVEL CONSULTANTS, WORLDWIDE AIRLINES SERVICE and CALEDONIAN FRIENDSHIP SOCIETY,

C. K. FROEHLICH TRAVEL SERVICE, INC., also d/b/a INTERNATIONAL UNIVERSITIES ASSOCIATION, and INTERNATIONAL UNIVERSITIES ASSOCIATES,

JOSEPH WILLIAM O'MELIA, Individually and as Officer, Agent, Servant or Employee of, and d/b/a C. K. FROEH-

LICH TRAVEL SERVICE, INC. and INTERNATIONAL UNIVERSITIES ASSOCIATION, and INTERNATIONAL UNIVERSITIES ASSOCIATES,

ALBERT A. GLEN, JR., Individually and as Officer, Agent, Servant or Employee of, and d/b/a C. K. FROEHLICH TRAVEL SERVICE INC., INTERNATIONAL UNIVERSITIES ASSOCIATION and INTERNATIONAL UNIVERSITIES ASSOCIATES,

JOHN BRADFORD, Individually and as Officer, Agent, Servant or Employee of, and d/b/a C. K. FROEHLICH TRAVEL SERVICE, INC., INTERNATIONAL UNIVERSITIES ASSOCIATION, and INTERNATIONAL UNIVERSITIES ASSOCIATES,

LUAN STASSI, Individually and as Officer, Agent, Servant or Employee of, and d/b/a C. K. FROEHLICH TRAVEL SERVICE, INC., INTERNATIONAL UNIVERSITIES ASSOCIATION, and INTERNATIONAL UNIVERSITIES ASSOCIATES,

CONSOLIDATED AIR BROKERS, INC.,

CHARTER AND GROUP TRAVEL SPECIALISTS,

FRED MEYROW, Individually and as Officer, Agent, Servant or Employee of, and d/b/a CONSOLIDATED AIR BROKERS, INC.,

LILLIAN MEYROW, Individually and as Officer, Agent, Servant or Employee of, and d/b/a CONSOLIDATED AIR BROKERS, INC. and CHARTER AND GROUP TRAVEL SPECIALISTS,

JOHN BLAKELY, Individually and as Officer, Agent, Servant or Employee of and d/b/a CHARTER AND GROUP TRAVEL SPECIALISTS,

IRA KARP, Individually and as Officer, Agent, Servant or Employee of, and d/b/a CHARTER AND GROUP TRAVEL SPECIALISTS,

DAN AIR SERVICES LIMITED,

DONALDSON INTERNATIONAL AIRWAYS,

LAKER AIRWAYS,

PAN AMERICAN WORLD AIRWAYS,

TRANS INTERNATIONAL AIR LINES,

UNIVERSAL AIRLINES, INC.,

BRITISH MIDLAND AIRWAYS,

BRITISH OVERSEAS AIRWAYS CORPORATION,

AIR - INDIA,

Defendants.

DECISION AND ORDER
October 25, 1972

APPEARANCES:

ROBERT A. MORSE, ESQ.
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

CARL I. STEWART, ESQ.
Assistant United States Attorney
Of Counsel

BERNARD KENNY, ESQ.
Attorney for Defendants
22 East 40th Street
New York, New York 10016

VINCENT M. McCONNELL, ESQ.
Of Counsel

BOROS & LESTER, ESQS.
Attorneys for Defendants
1120 Connecticut Avenue, N.W.
Washington, D. C.

HOWARD S. BOROS, ESQ.
Of Counsel

HOFHEIMER, GARTLIR, GOTTLIEB & GROSS, ESQS.
Attorneys for Defendants*
61 Broadway
New York, New York 10006

*Originally, the defendants, Consolidated Air Brokers, Inc., Fred Meyrow and Lillian Meyrow, were represented by Mr. Boros. However, he was later substituted by the firm of Hofheimer, Gartlir, Gottlieb & Gross, Esqs.

TRAVIA, D. J.

The plaintiff, CIVIL AERONAUTICS BOARD [hereinafter CAB], instituted this action to enjoin and restrain the defendants, certain travel agencies and certain named individuals associated therewith, from engaging in specific activities as "indirect air carriers and indirect foreign air carriers." See Title 49 U.S.C. § 1301(3), (19).[1] In addition, the CAB requested the enforcement of a cease and desist order, issued by the CAB on June 23, 1971. That order, docket numbers 22307 and 22311, was issued against Charter Consultants, Inc., and Fred Meyrow, individually, and directed that they refrain from engaging in air transportation as indirect air carriers.[2]

The CAB alleges that the defendants, while acting as indirect air carriers, are violating certain rules and regulations of the CAB, made pursuant to the Federal Aviation Act and, more particularly, that the defendants' activities are in violation of Title 49 U.S.C. §§ 1371(a) and 1372(a). These sections provide that all air carriers, direct or indirect, domestic (1371) or foreign (1372), must secure a certificate or permit of

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[1]Section 1301(3) defines an air carrier as follows:

"'Air carrier' means any citizen of the United States who undertakes, *whether directly or indirectly* or by lease or any other arrangement, *to engage in air transportation* . . ."

Section 1301(19) defines foreign air carrier as follows:

"'Foreign air carrier' means any person, not a citizen of the United States, who undertakes, *whether directly or indirectly* or by any other arrangement, *to engage in foreign air transportation.*" (Emphasis added.)

[2]A copy of the cease and desist order is attached to the civil complaint filed in this action by the CAB.

authorization from the CAB to engage in such activities.[3]

The defendants do not contest the validity of sections 1371 or 1372, nor do they allege that they have complied with the statutory mandates by securing a certificate or permit. They contend that the statutory mandates are not applicable to them because they are not acting as direct or indirect air carriers but merely as ticket agents as defined in Section 1301(35) of Title 49 U.S.C.[4] The defendants also contend that the CAB has not, as to each of them, ruled that their activities would make them indirect air carriers as defined in Sections 1301(3) and 1301(19). They, therefore, request that the court, at this time, exercise its discretion under the doctrine of primary jurisdiction and refer the question of their status within the industry to the CAB for an administrative determination. The defendants urge the necessity of an administrative ruling in the first instance because the agency is better equipped to evaluate the defendants' status within the aviation industry. To fortify their argument on

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[3]Section 1371(a) provides:

"No *air carrier* shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

Section 1372(a) provides:

"No *foreign air carrier* shall engage in foreign air transportation unless here is in force a permit issued by the Board authorizing such carrier so to engage." (Emphasis added.)

[4]Section 1301(35) defines ticket agent as follows:

"'Ticket agent' means any person, *not an air carrier or a foreign air carrier* and not a bona fide employee of an air carrier or foreign air carrier, who, as principal or agent, sells or offers for sale any air transportaton, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges for such transportation." (.Emphasis added.)

primary jurisdiction, the defendants point out that other members of the industry are presently awaiting the CAB's ruling on the exact question of status presented in this case, and that the CAB has made rulings which affect this proceeding.[5]

A determination of the defendants' status within the aviation industry is the basic question in this proceeding. Clearly, such an issue presents a question of fact. The defendant can only be held liable for the violations alleged if they are in fact found to be operating as indirect air carriers, as defined in Section 1301 (3) of Title 49, U.S.C. The court will, therefore, for the purpose of the defendants' renewed motion to dismiss, only consider the question of whether this court should apply the doctrine of primary jurisdiction, and thereby refer the issue of the defendants' status to the CAB for their administrative ruling.

Before discussing the concept of primary jurisdiction, the court will give a brief chronological summary of the case at bar so as to "set the stage" and, thus, enable the reader to better understand the position now to be taken by this court on the motion before it.

The original complaint was filed on September 17, 1971. On October 6, 1971 an order to show cause was signed, at the plaintiff's request, which order

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[5]*See* CAB Order 72-8-89, Docket No. 24687 (August 21, 1972); 41 U.S.L.W. at 2172 (October 3, 1972). In addition, the defendant, Aeromatic Travel Corporation, has included in its memorandum in support of their original motion to dismiss a complete list of the similar cases now pending before the CAB. *See* defendants' memorandum, at 14.

sought the issuance of a temporary injunction directed against the defendants named. On October 29, 1971, the plaintiff moved for an order to add additional defendants, which was granted. Thereafter, the defendants moved to dismiss the complaint on various grounds, including the theory of primary jurisdiction. Decision was reserved after oral argument on November 5, 1971.

On November 24, 1971 this court issued its decision concerning the several motions made by the defendants. In that decision the defendants' motions were "denied with leave to renew at an appropriate time . . ." Further, the court stated:

> "[T]hat during the evidentiary hearing to be held on the plaintiff's motion for a temporary injunction other facts and circumstances will come to light that may make this Court's determination on the issue of primary jurisdiction easier." Decision of November 24, 1971, at 29.

Thereafter, several defendants to the action moved to add party defendants, alleged to be indispensable. Those motions were granted and an order was made directing the plaintiff to amend the complaint and add nine defendants, alleged to be indispensable parties. The plaintiff followed the order of the court as it decided to interpret the said order. It merely amended the caption of the case by adding the additional defendants and then, as if to scorn the real meaning of the order, in allegation after allegation excluded the

additional defendants from any blame or wrong-doing. As a result, the court was compelled to grant the motions of the additional defendants to dismiss the amended complaint as against them. The court, on the argument of said motions, directed the original defendants to renew their motions on the issue of primary jurisdiction, considering this to be an appropriate time.

As a result of the aforementioned dilatory maneuvering, this case is now at the stage that existed in November 1971. This court will now reconsider the renewed motions of the original defendants to dismiss this complaint on the theory that the court should apply the doctrine of primary jurisdiction and refer the matter to the CAB for its administrative decision.

PRIMARY JURISDICTION

The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies. The doctrine has been invoked to forestall the Federal courts from trying a case which involves issues placed within the special competence of an administrative body. This doctrine is not to be confused with the doctrine of exhaustion of administrative remedies; both are separate and distinct principals of law.[6]

[6] *See United States v. Western Pacific Railroad Co.*, *infra*, at 165, 77 S.Ct. at 161 (1956); *see also* 3 K. Davis *Administrative Law Treatise*, § 19.01 at 2 (1958).

The rationale behind the doctrine of primary jurisdiction is set forth with particular clarity in *United States v. Western Pacific Railroad Co.*[7] That case involved an action for money damages allegedly due from the United States to the Railroad for the shipping of aerial bomb cases filled with napalm gel. The issue presented was whether the Government should have paid higher first-class rates or the lower fifth-class rate. The United States defended by arguing that such a question should be considered and determined by the administrative agency commissioned to regulate that particular industry. Mr. Justice Harlan, in his majority opinion holding that the question should be determined by the I.C.C., stated in part:

> "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation . . . More recently the expert and specialized knowledge of the agencies involved has been particularly stressed."

United States v. Western Pacific Railroad Co., 352 U.S. 59, at 64, 77 S.Ct. 161, at 165 (1956); *see also Far East Conference v. United States*, 342 U.S. 570, 72 S.Ct. 492 (1952). In effect, the doctrine of primary jurisdiction will determine whether the court or the administrative body should make the initial determination. The doctrine does not necessarily allocate power

[7] 352 U.S. 59, 77 S.Ct. 161 (1956).

between the courts and various agencies, for it only determines who shall first consider the issue, and not who shall finally consider such issue.[8] Therefore, a determination by a court that an agency has primary jurisdiction over a particular question does not necessarily mean that the court will refrain from deciding the case before it; it may mean that the court has, in its discretion, chosen to postpone its decision until after the administrative body has ruled on the certified issue.[9]

DEFENDANTS' MOTION TO DISMISS

On July 20, 1972, following oral argument held on June 30, 1972, several of the defendants, at the court's suggestion, renewed their motions to dismiss this case claiming that the court should apply the doctrine of primary jurisdiction. Likewise, the plaintiff renewed its position in opposition to such a dismissal.

The arguments set forth by the defendants in their renewed motion are, in essence, identical to those asserted in their original motion. The backbone of their argument is that the defendants' liability in this case will only exist if it is found that their activities are those of an indirect air carrier. In short, a determination of the defendants' status within the aviation industry will establish or negate their liability. Thus, the defendants argue, "where industry practice is a sig-

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[8] 3 K. Davis, *Administrative Law Treatise*, § 19.01, at 3 (1958).

[9] 3 K. Davis, *Administrative Law Treatise*, *supra*.

nificant consideration in pigeonholing the type of activity under consideration, the administrative tribunal should, in the first instance, make findings of fact on that practice."[10]

The plaintiff begins its second memorandum in opposition to this motion by alleging that the court may not now grant this renewed motion to dismiss because the prior motion was denied pending an evidentiary hearing, which hearing has not yet been held.[11] This contention, designed to limit the court's discretionary power, is not supported in law or reason. A court's power to defer an issue or case under the primary jurisdiction doctrine is purely discretionary and can be invoked at any stage.[12] There is no hard and fast rule which must be satisfied before the doctrine can be employed. The very nature of the doctrine lends itself to a situation whereby the courts may, at any time, with or without an evidentiary hearing, consider the appropriateness of its application.[13] Although the prior motion was denied, the court specifically stated that it would consider a renewal of that motion at an ap-

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[10]Memorandum in support of the defendants' motion to dismiss (for defendant, Ira Karp, filed July 20, 1972).

[11]Plaintiff's memorandum, at 2 (filed August 11, 1972).

[12]*United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161 (1956).

[13]*See United States v. Western Pacific Railroad Co.*, 352 U.S. at 64, 77 S.Ct. at 165 (1956); *Far East Conference v. United States*, 342 U.S. 570, 72 S.Ct. 492 (1952).

propriate time in the future.[14] This opportunity to renew was not contingent entirely on the findings of an evidentiary hearing. To now require this court to conduct such a hearing before it can exercise its discretion and apply the doctrine of primary jurisdiction would alone seriously limit the powers of the court. Further, such a requirement would necessarily delay a final determination of the case and thereby burden all of the parties needlessly.[15]

Following their initial argument the plaintiff, CAB, then asserts the proposition that this court should not grant the defendants renewed motion to dismiss because there is no question in this case involving the special expertise of an administrative body and the request for an application of the doctrine of primary jurisdiction is unfounded. In support of this latter, more substantial claim, the plaintiff relies on the holding in *CAB v. Modern Air Transport, Inc.*, 179 F.2d 622 (2d Cir. 1950). In that case the United States Court of Appeals, Second Circuit, affirmed the district court's decision and refused to apply the doctrine of primary jurisdiction where the issue was concern-

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[14]The opportunity to renew the motion was granted by the court because, at that time, the court was not completely convinced by the arguments made. In fact, the court noted:

> "That this Court is not completely convinced by the reasoning of the defendants. This Court is of the opinion that the *Pan American World Airways, Inc.*, case, supra can be distinguished from the case as bar as can the cases cited by the plaintiff." Court's Decision of November 24, 1971, at 29.

[15]As the chronological summary of this case illustrates, the defendants have already been burdened needlessly by the issuance of an alleged amended complaint which had to be dismissed for failure to state a cause of action. Any further dilatory procedures should not be permitted.

ing the violation of a rule rather than the reasonableness of the rule. Judge Clark, in his opinion, stated:

> [T]his doctrine [primary jurisdiction] is not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule, but rather a violation of such rule or rate . . ."

CAB v. Modern Air Transport, Inc., id. at 624.

This court does not take issue with the rule of law so clearly presented in *Modern Air*. It does, however, feel that the circumstances and issues of the pending case are quite different from the circumstances that existed in *Modern Air*. In *Modern Air* there was no question as to the defendant's status within the industry. In fact, the defendant there admitted to being an air carrier engaged in air transportation on an irregular basis.[16] It was, therefore, clear that the defendant was subject to certain rules and regulations pertaining to air carriers. In the instant case, the defendants do not admit to being a particular type of air carrier engaged in air transportation, rather, they allege only to sell such transportation as mere ticket agents.

The real question in *Modern Air* was whether the defendant, an admitted air carrier, was operating on a regular basis.[17] The court found that the CAB had already set forth clearly and precisely the standards

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[16]*CAB v. Modern Air Transport, Inc. id.* at 624.

[17]*CAB v. Modern Air Transport, Inc., id.* at 624.

necessary to determine such an issue of frequency.[18] In short, the court in *Modern Air (supra)*, needed only to apply the specific rules and regulations to a known and admitted violator of such rules and regulations. In contrast, this court does not enjoy the benefit of such certainty as to whether the defendants are indeed indirect air carriers, nor is this court blessed with the advantage of having clear standards and criteria by which it could be guided in determining such a question as to the defendants' status.

Although there are several other cases on the subject of air carriers, those cases do not offer sufficient assistance. In all of the cases considered, the facts and relationships of the parties do not sufficiently complement or parallel the factual situation at bar.[19] The court, at this stage in the case at bar, is now of the opinion that any substantial reliance on those cases to determine the issue presented here would be misplaced and misleading.

In addition to the lack of clear statutory language or case law defining the term "indirect air carrier," the question presented in this motion is further complicated by the actions of the CAB itself. The defendants in this case have pointed out to the court that while this suit has been pending, several members of the avi-

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[18] *Id.* at 625.

[19] *Pan American World Airways v. United States*, 371 U.S. 296 (1963); *Pan American World Airways, Inc. v. CAB*, 392 F. 2d 483 (D.C. Cir. 1968); *World Airways, Inc. v. Northeast Airlines, Inc.*, 349 F.2d 1007 (1st Cir. 1965); *Monarch Travel Services, Inc. v. Associated* Cultural Clubs, Civil Action No. 71-1176-WPG (June 4, 1971) (C.D. Cal.).

ation industry are awaiting an administrative decision on the very question of status raised by this motion.[20] The existence of such a situation, in the court's opinion, seems to give greater weight to the defendants' argument that the doctrine of primary jurisdiction should be applied. Clearly, its application would prevent the possibility of conflicting decisions.

As a result of the foregoing, the court is now of the opinion that any ruling as to the differences between an indirect air carrier and a ticket agent can best be made, in the first instance, by the administrative body charged with regulating the industry. There is no doubt that the Civil Aeronautics Board would be better equipped to characterize and define the subtle differences between the two roles.

Accordingly, the court exercises its discretion to apply the doctrine of primary jurisdiction, and hereby refers the issue of the defendants' status to the CAB. In doing so, however, the court does not relinquish its jurisdiction over this case and stays the final determination until after the agency's decision.

Submit an order with notice of settlement in accordance with this decision.

ANTHONY TRAVIA
U.S.D.J.

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[20]In addition to the fact that several similar cases are pending before the Board certain other developments, initiated by the Board, may bear on the issues at bar. On August 21, 1972 the CAB issued an order instituting an investigation of the passenger fare discounting practices in the North Atlantic market. Further, the October 3, 1972 issue of *The United States Law Week*, at 1272 refers to a "new regulation" affecting the operation and practices of the charter tour business.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

71-C-1232
November 24, 1971

CIVIL AERONAUTICS BOARD,
Plaintiff,
— against —
AEROMATIC TRAVEL CORP.,

TOUR EUROPE TRAVEL AGENCY, INC., also d/b/a TOUR EUROPE TRAVEL SERVICES, INC., TOUR EUROPE TRAVEL CONSULTANTS, WORLDWIDE AIRLINES SERVICE and CALEDONIAN FRIENDSHIP SOCIETY,

CHRISTIAN DUBREUIL, Individually and as Officer, Agent, Servant or Employee of, and d/b/a AEROMATIC TRAVEL CORP., TOUR EUROPE TRAVEL AGENCY, INC., TOUR EUROPE TRAVEL SERVICES, INC., TOUR EUROPE TRAVEL CONSULTANTS, WORLDWIDE AIRLINES SERVICE and CALEDONIAN FRIENDSHIP SOCIETY,

FINBAR SULLIVAN, a/k/a FINBAR O'SULLIVAN, Individually and as Officer, Agent, Servant or Employee of, and d/b/a AEROMATIC TRAVEL CORP.,

PHILLIP NEWMORE, Individually and as Officer, Agent, Servant or Employee of, and d/b/a TOUR EUROPE TRAVEL AGENCY, INC., TOUR EUROPE TRAVEL SERVICES, INC., TOUR EUROPE TRAVEL CONSULTANTS, WORLDWIDE AIRLINES SERVICE and CALEDONIAN FRIENDSHIP SOCIETY,

RORY ALKIN, Individually and as Officer, Agent, Servant or Employee of, and d/b/a TOUR EUROPE TRAVEL AGENCY, INC., TOUR EUROPE TRAVEL SERVICES, INC., TOUR EUROPE TRAVEL CONSULTANTS, WORLDWIDE AIRLINES SERVICE and CALEDONIAN FRIENDSHIP SOCIETY,

JOHN S. BOYLAN, a/k/a JOHN STANLEY, Individually and as Officer, Agent, Servant or Employee of, and d/b/a TOUR EUROPE TRAVEL AGENCY, INC., TOUR EUROPE TRAVEL SERVICES, INC., TOUR EUROPE TRAVEL CONSULTANTS, WORLDWIDE AIRLINES SERVICE and CALEDONIAN FRIENDSHIP SOCIETY,

C. K. FROEHLICH TRAVEL SERVICE, INC., also d/b/a INTERNATIONAL UNIVERSITIES ASSOCIATION,

JOSEPH WILLIAM O'MELIA, Individually and as Officer, Agent, Servant or Employee of, and d/b/a C. K. FROEHLICH TRAVEL SERVICE, INC. and INTERNATIONAL UNIVERSITIES ASSOCIATION,

JOHN BRADFORD, Individually and as Officer, Agent, Servant or Employee of, and d/b/a C. K. FROEHLICH TRAVEL SERVICE, INC. and INTERNATIONAL UNIVERSITIES ASSOCIATION,

LUAN STASSI, Individually and as Officer, Agent, Servant or Employee of, and d/b/a C. K. FROEHLICH TRAVEL SERVICE, INC. and INTERNATIONAL UNIVERSITIES ASSOCIATION,

CONSOLIDATED AIR BROKERS, INC.,

CHARTER AND GROUP TRAVEL SPECIALISTS,

FRED MEYROW, Individually and as Officer, Agent, Servant or Employee of, and d/b/a CONSOLIDATED AIR BROKERS, INC.,

LILLIAN MEYROW, Individually and as Officer, Agent, Servant or Employee of, and d/b/a CONSOLIDATED AIR BROKERS, INC. and CHARTER AND GROUP TRAVEL SPECIALISTS,

JOHN BLAKELY, Individually and as Officer, Agent, Servant or Employee of, and d/b/a CHARTER AND GROUP TRAVEL SPECIALISTS,

Defendants.

DECISION

APPEARANCES:

ROBERT A. MORSE, ESQ.
United States Attorney, E.D.N.Y.
Attorney for Plaintiff

CARL I. STEWART, ESQ.
Assistant United States Attorney
Of Counsel

BERNARD KENNY, ESQ.
Attorney for Defendants

VINCENT M. McCONNELL, ESQ.
Of Counsel

BOROS & LESTER, ESQS.
Attorneys for Defendants

HOWARD S. BOROS, ESQ.
Of Counsel

TRAVIA, D. J.

The plaintiff, Civil Aeronautics Board ("CAB"), is seeking injunctive relief restraining the defendants, certain travel agencies and certain named individuals associated therewith, from engaging in certain business practices alleged to be violative of the Federal Aviation Program. The defendants move for various types of relief, including dismissal of the complaint.

The complaint alleges that jurisdiction is founded on 28 U.S.C. § 1345 and 49 U.S.C. § 1487. (To be discussed *infra* on the question of venue).

The defendants are alleged to be acting in violation of three aspects of the Federal Aviation Program: all of the defendants are alleged to be violating certain statutory provisions; all of the defendants are alleged to be violating certain regulations promulgated by the CAB; certain of the defendants are alleged to be violating a CAB cease and desist order.

With regard to the alleged statutory violations, it is claimed that the defendants, by virtue of their business practices, are indirect air carriers within the purview of 49 U.S.C. § 1301(3), (20), and (21) or indirect foreign air carriers within the purview of 49 U.S.C. § 1301(19) and (21);[1] and that they have acted and continue to act as such without the required certification by the plaintiff under 49 U.S.C. § 1371(a)[2] or the permit authorizing such acts under 49 U.S.C. § 1372 (a).[3]

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[1] 49 U.S.C. § 1301 reads in part:

"(3) 'air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation . . ."

* * * * *

"(19) 'Foreign air carrier' means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation."

[2] 49 U.S.C. § 1371(a) reads:

"No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

[3] 49 U.S.C. § 1372(a) reads:

"No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage."

As to the regulatory violations, it is alleged that the defendants offer to sell and sell "charter" air transportation between the United States and Europe to the general public contrary to those CAB regulations governing charter air transportation, which are prohibited under 14 C.F.R. Parts 207.11(b)(2) et seq.

Finally, it claimed that certain of the defendants, Fred Meyrow and Lillian Meyrow, are acting in violation of CAB Order 71-6-117, which became effective on June 23, 1971. The Order directs a New York corporation, Charter Consultants, Inc., and Fred Meyrow, its president, to cease and desist from engaging in certain practices similar to those complained of herein.

For relief, plaintiff seeks a judgment permanently enjoining and restraining the defendants from violating the statutes, regulations, and order specified in the complaint. It also seeks judgment enjoining the defendants from failing to refund promptly to each purchaser of charter air transportation, whose contract may not be performed due to the alleged violations, the full consideration paid for such transportation. The plaintiff also seeks a preliminary injunction restraining the defendants from engaging in those practices alleged in the complaint. An evidentiary hearing on the application for a preliminary injunction has been adjourned without date pending a determination of motions made by the defendants directed to the complaint and the jurisdiction of this Court.

The defendants move to dismiss the complaint on several grounds. They maintain (1) that the case is not ripe for the exercise of this Court's jurisdiction since primary jurisdiction lies with the CAB; (2) that the complaint fails to state a cause of action; (3) that the filing of the complaint was not properly authorized by the CAB; (4) that the plaintiff has failed to join indispensable parties; and (5) that venue is not proper in the Eastern District of New York.

The question of primary jurisdiction will be discussed last since it is the most perplexing problem to be discussed.

I. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM.

Defendants argue that the regulations, in the light of specific allegations in the complaint, cannot apply to the defendants. They argue, essentially, that the defendants referred to in the particular paragraphs of the complaint are not "indirect air carriers" as defined in the statutes (49 U.S.C. §§ 1301(3), 1301(19)) and, therefore, they cannot be guilty of violations of 49 U.S.C. §§ 1331(a), 1372(a). They argue that the term "air carrier" is not defined in the Act nor by the CAB regulations. Several of defendants additionally argue that the defendants are ticket agents within the meaning of §1301(35), and ticket agents are not bound by the sections of the Federal Aviation Act ("Act") or the regulations specified in the complaint.

Since all of the defendants in this case are alleged to be engaged in unlawful foreign charter service, the only relevant distinction between "air carriers" and "foreign air carriers" is that of the nationality of the defendant.

The definition of the term "air carrier" is a broad one including not only those persons who engage directly in air transportation but also those who so engage "by lease or any other arrangement," that is "indirect air carriers." The CAB maintains that the defendants operating in the manner alleged are indirect air carriers and therefore subject to the requirements of § 1371(a) and § 1372(a).

They state that pursuant to the broad definition of "air carrier" in § 1301(3), the CAB has long regulated as indirect air carriers persons who do not themselves physically operate aircraft, but who as principals or on their own behalf hold out and sell air transportation services. It was stated in *Hacienda Hotels-Motels, Rooms and Flight Reservations, Inc. and U.S. Aircoach Enforcement Proceeding*, 26 CAB 372, 385 (1958), that:

> "It is the view of the Board that in general, a person not directly engaged in the operation of aircraft is an indirect carrier if such person sells transportation by aircraft to the general public other than an as authorized agent of a direct carrier in the consummation of transportation arrangements between the operator of the aircraft and the passengers."

It is also argued that in the case of *Pan American World Airways, Inc. v. CAB*, 392 F.2d 483 (D.C. Cir. 1968), it was held that certain tour operators were foreign air carriers. As basis for its ruling, the court noted that the tour operators arranged, operated, and conducted the tours; they determined how much each tour purchaser would pay for air transportation and connecting ground services; and aircraft and crews would be charted by the tour operators. It should be pointed out that the court affirmed the Board decision not to exercise jurisdiction over the foreign tour operators involved, even though such jurisdiction was within the Board, on the grounds of impracticality.

CAB also cites a recent case, *Monarch Travel Services v. Associated Cultural Clubs, Inc.*, 71-1176-WPG, entered June 4, 1971 (C.D. Cal.), wherein the court entered an order for a preliminary injunction against illegal passenger consolidators who had been operating as a "club" in California. The CAB maintains that the legal basis for that order was identical to that in the instant case: defendants were found to be operating as indirect air carriers in violation of 49 U.S.C. § 1371.

The CAB also alleges that it has regulated as air carriers certain businesses which would be considered air carriers only through a broad construction of § 1301. Certain courts have concurred in such regulation. These businesses include air freight forwarders, tour operators who handle exclusive tour charters, unau-

thorized cooperative shippers of consolidated cargo, and travel agents and "clubs" offering air transportation as principals.

Therefore, the CAB argues that the defendants are "indirect air carriers" and "indirect foreign air carriers" and as such are required by § 1371(a) and § 1372(a) to have certificates or permits issued by the CAB authorizing them to engage in air transportation. It is alleged that the certificates (or permits) have not been issued; that the defendants are not exempted from the requirements by statute; nor have they been exempted by CAB order.

The plaintiff alleges facts, which if proven, would constitute "engaging in air transportation." It is also alleged that in doing the acts complained of defendants are acting as indirect air carriers without a certificate of public convenience and necessity in violation of 49 U.S.C. § 1371(a). The question of whether defendants are indirect air carriers is the basic question in this case.

This Court feels that it must sustain the arguments of the plaintiff that the complaint sets forth allegations sufficient to state a cause of action although such allegations are questions of fact to be proven. Therefore, the motion of the defendants to dismiss on this ground is denied.

II. THAT THE FILING OF THE COMPLAINT WAS NOT AUTHORIZED BY CAB.

The defendants rely on the case of *Morgan v. United States*, 298 U.S. 468 (1936). The *Morgan* case was followed by a series of three more "*Morgan*" cases all of which watered down the first holding and in fact, in the last of the series, the Supreme Court virtually overruled its initial ruling. The defendants' reliance thereon is misplaced. The case now before the Court is distinguishable from the *Morgan* cases in many respects and in addition, in this case, the CAB has filed a copy of the Board authorization, dated September 15, 1971, by which this action was authorized.

Therefore, the motion of the defendants on this ground is denied.

III. THAT THE CAB HAS FAILED TO JOIN INDISPENSABLE PARTIES.

The defendants claim that it is not alleged that defendants held themselves out as providing air transportation or did so engage themselves; the defendants rather, it is alleged, sold tickets of other air carriers who are not before this Court. Those air carriers, identified in the affidavits and exhibits in support of the CAB motion, include Dan Air Services Ltd., Donaldson Airways, Laker Airways, Pan American World Airways, Trans International Air Lines, and Universal Air Lines, Inc., and it is argued, should be joined since they are indispensable parties under Rule 19, Fed. R. Civ. P.

It is argued that the CAB in commencing this action against the defendants because of the "vast black market in air transportation" has ignored the air carriers who have in fact provided the transportation service involved. The defendants submit that these air carriers are indispensable parties in that a decree cannot be rendered by the Court which will not affect their interest and because their absence leaves the controversy in such a condition that its final determination would be wholly inconsistent with equity and good conscience.

It is also contended that these carriers are the real parties in interest subject to regulation of Part 212 of C.F.R. cited as one of the parts violated by the defendants. They argue that they are mere ticket agents for the air carriers and if violation of the regulations occurred, it was the air carriers who violated the regulations and not the defendants.

The argument of the defendants in this regard must be sustained.

The Court directs the plaintiff to bring in as parties defendants the following:

Dan Air Services Limited

Donaldson International Airways

Laker Airways

Pan American World Airways

Trans International Air Lines

Universal Airlines, Inc.

The Court further directs the plaintiff to speedily conduct whatever pretrial discovery proceeding that may be necessary so that there shall be no delay in bringing on the hearing on the application for preliminary injunction.

IV. VENUE

Title 28 U.S.C. § 1345 and 49 U.S.C. § 1487 provide generally that civil actions commenced by federal agencies are to be brought in federal district courts and in particular that where the provisions of the Federal Aviation Act are being violated, the federal district courts are the proper places in which the violations are to be enjoined. Before an action brought by the CAB under § 1487 can proceed, however, there must be proper venue. Section 1487 provides that in the event of a violation, the CAB may seek proper remedies against the violators in "the district court of the United States, for any district wherein such person carries on this business or wherein the violation occurred . . ." The complaint alleges that the "Defendants carry on business within the Eastern District of New York and certain of the defendants' violations complained of herein, take place within the Eastern District of New York," (par. 3, Plaintiff's complaint).

Not all the defendants contest the venue of this action.

The defendants who press this issue state:

"No facts have been presented that Defendant

carries on business within the geographical jurisdiction of the United States District Court for the Eastern District of New York, nor that any of the alleged violations took place therein. Hence, venue does not lie here. (49 U.S.C. § 1487)." (Defendants' motion to dismiss, par. 2).

They claim that departures from John F. Kennedy International Airport ("JFK") are not violations of the Act; that the violations occurred, if indeed they did occur at all, with the "holding out for sale" and sale of transportation; that these activities did not occur in the Eastern District of New York ("E.D.N.Y."); and that the JFK departures cannot be said to amount to the defendants' carrying on business in E.D.N.Y. The case cited by the defendants is *United States v. National City Lines,* 337 U.S. 78 (1949), for the proposition that the CAB has failed to establish venue in E.D.N.Y. *National City* involved the applicability of the doctrine of *forum non conveniens* to antitrust suits and it appears that the defendants cannot place reliance on it.

A good amount of advertising is done in this District; the whole transaction is focused on JFK with the passengers, having purchased their tickets in the Southern District of New York, being obliged to check in at JFK and depart therefrom.

Moreover, any contention that the Southern District of New York would be a more convenient forum is frivolous. There is a mere difference in two express

stops on the Lexington Avenue IRT Subway Line and if any inconvenience would be brought about, it would be done by a change of venue.

This motion is obviously without merit and is denied.

V. PRIMARY JURISDICTION

Defendants argue that the case should be dismissed because it is not ripe for the exercise of this Court's jurisdiction and primary jurisdiction over the subject lies in the CAB, itself.

It is argued that under §§ 1471 and 1472 the CAB has ample power to enforce civil and criminal penalties against those violating the Act and rules, regulations, and orders promulgated pursuant thereto; that under § 1482, the CAB has power to institute investigations, to make findings after notice of hearing that any person has failed to comply with the provisions of the Act, to make other findings relating to reasonableness of rates, to issue orders compelling compliance with the Act, to prescribe rates, and to make orders regulating air carriers and foreign air carriers; that the § 1487 authorization to the CAB to apply to federal courts for injunctive relief against violators of the Act and CAB rules, regulations and orders must be read in harmony with the other delegations of power to the CAB under the Act or the intent of Congress in enacting the Act will be frustrated. It is contended that if the Courts determined questions within the

jurisdiction of an administrative tribunal prior to the decision of the tribunal, at least in cases where the question demands the exercise of administrative discretion requiring the special knowledge and experience of the administrative tribunal, the intent of Congress would be frustrated.

It is also claimed the essential issue in the case is whether the defendants are indirect air carriers and that the issue is an esoteric one especially in the light of the dearth of judicial precedent in the area. Under the circumstances, this proceeding, especially in the light of the "indirect air carrier" issue, is one peculiarly suited to resolution by the CAB with its expertise and familiarity with the business practices which might be relevant to a determination of the issue.

The doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision; it applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. In such a case, the judicial process is suspended pending referral of such issues to the administrative agency for its views. *United States v. Western Pacific R. Co.*, 352 U.S. 61, 64 (1956).[4]

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[4]"Exhaustion of administrative remedies applies where a claim is cognizable in the first instance by an administrative agency *alone;* judicial interference is withheld until the administrative process has run its course." (352 U.S. at 63). (Emphasis added). The two terms, however, are often confused and used interchangeably; such is error. See 3 Davis, Administrative Law Treatise § 19.01, at 2, n.7.

Professor Davis has written extensively in his treatise concerning primary jurisdiction, 3 Davis, Administrative Law Treatise §§ 19.01 - 19.09, at 1-55. He states in part:

> "Possibly the best judicial statement of the doctrine is that of the Supreme Court in Far East conference v. United States:[5] 'The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.' The Court does not say that the power is withdrawn from the Court, but only that the agency should not be passed over. The Court makes this doubly clear in its next sentence: 'This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined.' The final power may thus still be in the Court.[6]
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> * * *
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> The principal reason behind the doctrine of primary jurisdiction is not and never has been the idea that 'administrative expertise' requires a transfer of power from courts to agencies, although the idea of administrative expertise does to some extent contribute to the doctrine. The principal reason behind the doctrine is recognition

[5]342 U.S. 570, 574 (1952).

[6]Davis notes that the original proceeding before the court may be continued after the agency has acted, or the agency's action may be reviewed in a direct review proceeding. At 3, n.8.

of the need for orderly and sensible coordination of the work of agencies and of courts. Whether the agency happens to be expert or not, a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer, for otherwise parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements.

* * *

The Court in Far East Conference v. United States, 342 U.S. 570, 575, 72 S.Ct. 492, 495, 96 L.Ed. 576 (1952) applied the doctrine of primary jurisdiction and said that it was 'merely applying the philosophy which was put in memorable words by Mr. Justice (as he then was) Stone: ". . . court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim."

enforcement of the CAB claim, although originally

United States v. Morgan, 307 U.S. 183, 191, 59 S.Ct. 795, 799, 83 L.Ed. 1211.'

* * *

What has been emphasized above in this section — that the question of primary jurisdiction is whether agency or court should act first and not whether the court will refuse to act at all — is now fully confirmed by a 1958 decision of the Supreme Court that a holding that an agency had primary jurisdiction to determine the legality of practices did not imply that the agency could properly approve the practices. Instead, said the Court: 'The holding that the Board had primary jurisdiction, in short, was a device to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to those particular circumstances.'" (*Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 498, 499 (1958).

The Supreme Court has stressed two reasons for the invocation of the doctrine of primary jurisdiction: chiefly, the necessity of a desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions and the most desirable result which would more likely be rendered by the agency possessed of expertise and specialized powers. *See Western Pacific, supra* at 64.

Therefore, the issue with regard to primary jurisdiction and its relevance in this case is whether the

cognizable in this Court under § 1487, requires the resolution of issues which under the regulatory CAB scheme have been placed within the special competence of the CAB; in other words, does this case raise issues of fact[7] the resolution of which are not within the conventional experience of judges but which would be more properly resolved by the CAB in the exercise of its administrative function.

One case is of essential importance herein: *CAB v. Modern Air Transport,* 179 F.2d 622 (2d Cir. 1950). It is discussed by all parties to this proceeding and also dealt with by Professor Davis in his treatise. In that case, the CAB had sought and obtained a preliminary injunction restraining the defendant from operating flights in excess of the frequency and regularity permitted by the terms of an economic regulation exempting that class of air carrier from certification. The action was commenced under the Civil Aeronautics Act of 1938 but the language contained in the relevant parts therein is identical to the statutory language involved herein. On appeal, the defendants argued that the district court should have declined jurisdiction on the basis of "primary jurisdiction." In affirming the district court, the Court of Appeals, Second Circuit stated:

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[7]It should be noted that primary jurisdiction is involved with questions of fact; questions designated as "law" by the Courts may be appropriately determined in the first instance by courts because uniformity may be secured through review to the single Supreme Court. The Supreme Court could not perform its unifying function as to matters of fact because it cannot involve itself with them. *See Great Northern R. Co. v. Merchants El. Co.*, 259 U.S. 285, 291 (1922).

"It [defendant] earnestly contends that so long as its letter of registration as an Irregular Air Carrier has not been suspended, its exemption from section 401(a) [49 U.S.C. §1371(a)] is absolute and complete, and that the Court has no jurisdiction to enjoin its unauthorized regular service until the Board has first proceeded to take action to suspend or revoke the letter of registration . . .

* * *

Under [the doctrine of primary jurisdiction] the courts will not determine a question within the jurisdiction of an administrative tribunal prior to the decision of the tribunal where the question demands the exercise of administrative discretion requiring the special knowledge and experience of the administrative tribunal. 42 Am. Jur. 698-702. This self-denying doctrine has been used by the courts as a ground for refusing to decide the difficult issues of reasonableness of a rate of fairness of a regulation which fall within the area of special competence of the particular administrative agency and for which the agency is said to have primary jurisdiction. 51 Harv. L. Rev. 1251. But this doctrine is not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule . . .

* * *

Our present case is one involving the violation of a lawful regulation of the Board, rather than one requiring expert appraisal of the reasonableness of a company action. The Board, within the authority given it by the Act, has granted an exemption for noncertificated carriers and has set out

> the standards with which the carrier must comply in order to enjoy the exemption [Part 292 of the Economic Regulations].[8]

The Court went on to review the pertinent regulatory provisions, finding that the defendant's activities had not conformed to those provisions, and that therefore they were operating in violation of Title 49 U.S.C. § 1371(a) and that the district court had jurisdiction to issue the preliminary injunction:

> "It is of course true that the distinction set by the Supreme Court may afford difficulties in a borderline case. It is also true that even the question of violation of a regulation may be difficult, though we do not understand that there is anything in the doctrine which excuses a court from deciding a question of violation because it may be difficult. But the value of the distinction as established is shown in a case such as this where there can be no doubt of the violation and a rereference to the Board to decide whether it was correct in seeking an injunction under the statute can be only a delaying formalism peculiarly undesirable in the application of the vital controls needed for aircraft."[9]

The court expressly reserving the question whether the court might have jurisdiction to issue such an injunction at the suit of a private party, concluded that:

> ". . . where, as here, the Board is the petitioner

[8] 179 F.2d 622, 624, 625; See also generally Louis L. Jaffee, Primary Jurisdiction 77 Harv. L. Rev. 1037 (1964)

[9] 179 F. 2d 622, 625.

seeking restraint of a violation of law, we find no judicial barrier to granting the swift remedy accorded it by Congrses."[10]

In his discussion of the case Professor Davis remarks that where the agency (CAB) is the plaintiff who brings the action in enforcement pursuant to the statute, the reasons behind the doctrine of primary jurisdiction are met. 3 Davis § 19.02. When the agency is the plaintiff, the court has the advantage of knowing its position and in such circumstances that is the principal function of the doctrine of primary jurisdiction (3 Davis, § 19.02, n. 41). Therefore, it would seem that (1) there would be no chance of confusing holdings between the Board and the courts because the courts are put on notice of the Board's attitude toward an issue, and (2) the reasons favoring an agency determination based on agency expertise are mitigated where the agency by commencing the action is virtually admitting that the court's expertise in resolving the question is equal to if not greater than its own.

The cases relied on by the plaintiff are also cited by the defendants in favor of their position. It is claimed that the *Modern Air Transport* case, *supra*, involved undisputed facts; the court was presented with a clear and admitted violation of a CAB statute, and the defendant raised only jurisdictional arguments. There was no necessity for the resolution of

[10]179 F.2d 622, 626

complex issues by a specialized agency. The Court stated:

> ". . . there can be no doubt of the violation and a re-reference to the Board to decide whether it was correct in seeking an injunction under the statute can be only a delaying formalism peculiarly undesirable in the application of the vital controls needed for aircraft." (179 F. 2d at 625-626).

It is alleged that the case of *World Airways, Inc. v. Northeast Airlines, Inc.*, 349 F. 2d 1007 (1st Cir. 1965), is also distinguishable. In deciding that the issues before it were of a legal nature and that referral of the case to the CAB would not be proper, the court stated:

> "The issue is whether the contract between World and Nationwide violates the certificate of authority issued to World. The language of the certificate is clear . . . The answer depends on whether the contract violates this exclusion and requires an analysis of the contract. *The analysis, interpretation, construction, and application of contracts are within judicial competence and, at least in the case before us, require no administrative expertise for solution.* (349 F.2d at 1011). (Emphasis added).

Moreover, it is argued that the Davis analysis is not valid in this case. It is Professor Davis' position that where the agency itself is plaintiff there need be no prior resort to the agency for its determination because the court is placed on notice of the agency's

position. Such is not the case herein. Although the CAB brings this action, it cannot be said that the Board's authorization to the Director of the CAB Bureau of Enforcement to commence this action is indictative of the Board's position on the difficult issues presented. The defendants state that the Board has presently pending before it a great many cases presenting issues virtually identical to those herein and they have been before the Board for well over a year without decision; furthermore, over the course of the last eight and one-half years, the CAB has been conducting its "Investigation of the Tariff and Fare Activities and Practices on North Atlantic Routes;" that masses of material have been gathered by the Board in the course of its investigation.

The defendants lay great stress on the case of *Pan American World Airways v. United States*, 371 U.S. 296 (1963). That case involved a civil antitrust suit brought by the Attorney General against Pan American and W. R. Grace & Co. charging violations by air carriers of Sections 1, 2 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 2, 3. The Supreme Court determined that the suit initiated in a federal district court had to be dismissed since the issues involved in the case had been entrusted to the CAB. The Court held that it was peculiarly a question for the Board to determine whether the transactions in question met the standards of competition and monopoly provided in the Civil Aeronautics Act. It was stated that Section 411 of the Act leaves with the CAB

> ". . . all questions of injunctive relief against the division of territories, or the allocation of routes, or against combinations between common carriers and air carriers . . ." (371 U.S. at 310).

Although not formally designated as plaintiff in the case, the CAB's position was absolutely clear; in fact it was the CAB which specifically requested the Attorney General to commence the action.

Therefore, the defendants allege that the contention of the CAB that it had made clear its position on the relevant factual issues by commencing this action, and that referral of those issues to the CAB would be useles and that this Court is bound to make all factual and legal determinations also must fail.

With regard to the statutory violations, it is alleged:

> ". . . defendants are indirect 'air carriers' within the purview of 49 U.S.C. § 1301 (3) (20) and (21), or indirect 'foreign air carriers' within the purview of 49 U.S.C. § 1301 (19) and (21). . . ."

It is further alleged that, as "indirect air carriers" or "indirect foreign air carriers," the defendants are acting in violation of 49 U.S.C. § 1371(a) in that they have not obtained the required certification by the CAB or are in violation of 49 U.S.C. § 1372(a) in that they have not obtained the requisite permit from the CAB. The issue of whether the necessary certifications or permits were obtained by the defendants pre-

sents no problem for this Court; the remaining issue of whether the activities engaged in by the defendants as alleged in the complaint constitute them as "indirect air carriers" while a more delicate one does not require particular expertise solely within the competence of the CAB. Certainly the Court does not envision any problem on this point in the case. An evidentiary hearing on the plaintiff's application for a temporary injunction may prove otherwise.

The CAB notes that it has issued a number of cease and desist orders against parties alleged to be carrying on operations similar to those of the defendants herein. It is argued that these orders provide the Court with an adequate basis for ascertaining the CAB's position with regard to the activities herein and that this Court should apply that construction of "indirect air carrier" to the defendants.

The CAB also relies on the recently decided case of *Monarch Travel Services, Inc.*, v. *Associated Cultural Clubs*, Civil Action No. 71-1176 - WPG, entered June 4, 1971 (C.D.Cal.). It is contended that the case is of important precedential value because it involved activities identical to those herein. The order of the court in that case, issued without written opinion, granted preliminary injunctive relief.

This Court is not completely convinced by the reasoning of the defendants. This Court is of the opinion that the *Pan American World Airways, Inc.*, case, *supra*, can be distinguished from the case at bar as can the

cases cited by the plaintiff. The Court feels that during the evidentiary hearing to be held on the plaintiff's motion for a temporary injunction other facts and circumstances will come to light that may make this Court's determination on the issue of primary jurisdiction easier.

Therefore, the motion of the defendants in this regard is denied with leave to renew at an appropriate time during the said hearing.

Other applications were made by the defendants as a part of their motions. These applications, if pursued, can be disposed of at the evidentiary hearing.

Submit orders in accordance with this decision with notice of settlement to be served on the opponents.

ANTHONY TRAVIA
U.S.D.J.

Service of the within and receipt of a copy thereof is hereby admitted this _____ day of January, A.D., 1973.

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